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IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-127

WILLIAM T. SHERIS (DECEASED), EMPLOYEE,
MAIDA LUDVIK SHERIS, WIDOW, *et al.*,
Petitioners,

v.

THE SHERIS CO., EMPLOYER
TRAVELERS INSURANCE COMPANY, INSURER,
Respondents.

BRIEF IN OPPOSITION

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TRAVELERS INSURANCE COMPANY, INSURER,

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BRIEF IN OPPOSITION

QUESTION PRESENTED

Whether the State of Virginia may terminate the right to compensation under its Workmen's Compensation Act, of beneficiaries who have recovered an amount in excess

of the state compensation benefit in an action brought against an international airline under the Death on the High Seas Act. Stated another way, the question is whether an air carrier whose airliner crashed over international waters resulting in death to an employee is an "other party" within the meaning of Va. Code §65.1-41 (1968 Repl. Vol.).

REASONS FOR DENIAL OF THE WRIT

I. THE VIRGINIA SUPREME COURT HAS INTERPRETED AND APPLIED VIRGINIA LAW, AND THERE IS NO FEDERAL QUESTION INVOLVED

The Workmen's Compensation insurance carrier is subrogated to the right of the personal representative of a deceased employee covered under the Workmen's Compensation Act to any right the personal representative " . . . may have against any other party for such injury or death . . . " . Virginia Code, §65.1-41 (1968 Repl. Vol.). The employee is not entitled to double recovery and if the employee or his personal representative makes a settlement of the action against the other party which results in recovery in excess of the amount to which the employee or his personal representative would be entitled under the Workmen's Compensation Act, further entitlement to compensation ceases. *Stone v. George W. Helme Co.*, 184 Va. 1051, 37 S.E.2d 70 (1946). There is no dispute that the personal representative of Mr. Sheris recovered an amount in excess of the amount to which the personal representative would be entitled under the Workmen's Compensation Act in a lawsuit against British European Airways Corporation in the United States District Court for the Eastern District of Virginia.

A fair reading of the opinion of the Virginia Supreme Court demonstrates that the decision in the instant case does not draw into question the validity of a treaty or statute of the United States. Workmen's compensation benefits are purely a creature of the state statute. The state legislature establishes the grounds for both origin and termination of benefits. The opinion of the Virginia Supreme Court holds only that compensation terminates when the beneficiary receives a certain amount from an "other party", and that the term "other party" includes an international air carrier whose airliner crashes over foreign waters. Manifestly, if a state may declare that its workmen's compensation statute is the exclusive remedy of an employee so as to preclude his right of action under the Death on the High Seas Act, Virginia may declare that workmen's compensation benefits cease when there has been sufficient recovery under the Death on the High Seas Act. See *King v. Pan American World Airways*, 270 F.2d 355 (9th Cir. 1959); *cert. den.* 362 U.S. 928, 80 Sup. Ct. 753, 4 L.Ed. 2d 746 (1960). The interpretation of a state statute by the highest court in the state is not reviewable by this Court. *Copperweld Steel Co. v. Industrial Commission of Ohio*, 324 U.S. 780, 65 Sup. Ct. 1006, 89 L.Ed. 1363 (1945).

II. THE VIRGINIA SUPREME COURT CORRECTLY DECIDED THAT AN ACTION AGAINST AN AIRLINE COVERED BY THE WARSAW CONVENTION BROUGHT IN A UNITED STATES DISTRICT COURT UNDER THE DEATH ON THE HIGH SEAS ACT TO RECOVER DAMAGES FOR THE DEATH OF A PASSENGER IS AN ACTION AGAINST AN "OTHER PARTY" AS DEFINED IN THE VIRGINIA WORKMEN'S COMPENSATION ACT

The Complaint which instituted the action against BEAC was brought under the provisions of the Death on the High Seas Act, 46 U.S.C. §761, *et seq.* and alleged that the death of Mr. Sheris " . . . was caused by the wrongful act, neglect or default of the defendant, British European Airways Corporation . . . " . The allegation, of course, conforms to the language of the Death of the High Seas Act. It is manifest that the action against British European Airways Corporation is such as is contemplated by the Workmen's Compensation Act against an "other party" and since the personal representative has recovered in that action, further right to compensation ceases, unless there is some peculiarity of the circumstances which takes the case out of the general rule.

Petitioners' attempt to remove this case from the general rule of subrogation by arguing that the fact that a treaty between nations known as the Warsaw Convention, 49 Stat. 3000 *et seq.* applies to the flight upon which Mr. Sheris was killed, makes the action against the air carrier one of personal insurance contract to which the Workmen's Compensation insurer would not be subrogated.

In a situation involving travel on an airline, there is no evidence to reveal that the passenger separately contracts

for or purchases insurance coverage. What the passenger purchases is flight from one place to another. When the flight is interrupted by a crash causing the death of the passenger, he brings his action under the Death on the High Seas Act, which is the federal version of a wrongful death statute. The fact that the employee may couch his pleading in terms indicating a breach of contract of carriage does not change the basic nature of the action.

It has been expressly held that the Warsaw Convention does not create an independent right of action. The Convention leaves it to local law to grant such a right of action. *Noel v. Linea Aeropostal Venezolana*, 247 F.2d 677 (2d Cir. 1957), *cert. den.* 355 U.S. 907, 78 S.Ct. 334, 2 L.Ed. 2d 262 (1957). The Warsaw Convention merely sets up a limitation on the amount to be collected and certain other conditions for and limiting recovery in an action involving international flights. As is stated by a recent writer on the subject: "The liability of an air carrier under the Warsaw Convention is based upon the concept of fault." Tompkins: The Warsaw Convention–Proposed Revisions, VI The Forum, No. 3 (April, 1971) at p. 154. The fact that the Convention shifts the usual burden of proof and removes certain defenses from the air carrier does not change the concept of tort liability, nor the nature of the action under the Death on the High Seas Act.

It is not contested that the carrier would not be subrogated to the employee's rights under a private insurance policy. To call a treaty between nations a private insurance policy stretches the imagination to the breaking point.

CONCLUSION

Wherefore, respondents respectfully pray this Court to deny the Writ.

Respectfully submitted,

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